U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

JUL 13 2010

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
LIN-07-236-50461

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. *The appeal will be dismissed.*

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a software quality assurance manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), which was certified by the Department of Labor (DOL).

The director determined that the Form ETA 750 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director denied the petition accordingly.

On appeal, counsel argues that the petitioner sought classification as an advanced degree professional based on the amended Form ETA 750 which clearly requires a master's degree in computer science, mechanical or electrical engineering or related field or a bachelor's degree in the required field and five years progressive experience in software development.

The record shows that the appeal is properly and timely filed. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

Here, the Form I-140 was filed on July 19, 2007. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

In this case, the Form ETA 750 was initially filed with DOL on July 24, 2003. The record contains a copy of the amended page 1 of the Form ETA 750A with the petitioner/employer's initial verifying amended items. The amended Form ETA 750A shows that the petitioner amended eight items on January 19, 2007. As of the portion of the job offer, the petitioner changed the college requirement from "B.S." to "MS", the college degree required from "Bachelor of Science" to "Master of Science" and added the following note to the degree requirement in Item 15: "Will consider candidates with B.S. in Computer Science, Mechanical or Electrical Engineering, or related field and five (5) years progressive experience in software development. Foreign degree equivalent accepted." The petitioner also amended the five years of experience requirement with three years. The Form ETA 750 was certified on May 3, 2007. The original certified coy of Form ETA 750 shows that on April 30, 2007, the DOL regional office converted the petitioner's amendments to the initially filed Form ETA 750, including items 2 alien address, 5 employer telephone, 6 employer address, 12 rate of pay, 14 experience requirement on Form ETA 750A and items 2 alien address and 8 employer address on the Form ETA 750B. However, the regional office did not convert the petitioner's amendments on the college requirement and college degree requirement in Item 14. For the note the petitioner added for the master of science degree, the officer wrote "see amendment" in Item 15 instead of converting the whole note onto the original Form ETA 750A. The record does not contain any documentary evidence showing that the Form ETA 750 was further amended, changed or corrected before it was certified on May 3, 2007.

On appeal, counsel argues that the handwritten "see amendment" by the regional office in Item 15 should be correctly interpreted as that the all amendments the petitioner made on the new Form ETA 750A be accepted and approved by the DOL regional office and thus be part of the certified Form ETA 750. However, counsel's assertion is not persuasive. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). The DOL regional office certifies a labor certification on the terms and conditions clearly set forth, corrected and approved by the regional office and it is the common practice that the regional office converts all approved correction and/amendments onto the original Form ETA 750 and stamps its approval as "correction approved by regional office" with the approved officer's initials and dates. In the instant case, the regional office did not stamp on the amendments of college requirement and

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

college degree requirement. The statement in Item 15 "see amendment" cannot be interpreted to mean that all the amendments including the amendments on college and college degree requirements had been accepted and approved by the DOL as part of certified labor certification. In addition, the alternate education requirement was set forth by the petitioner as an interpreting note to the master degree requirement. Since the amendment on the degree requirement was not accepted and approved by the regional office, the alternate education requirement, i.e. bachelor's degree plus five years of experience in lieu of a master degree, could not be part of the certified terms or conditions of the Form ETA 750.

On appeal, counsel also asserts that the DOL officer erred in not altering the master degree requirement. However, the record does not contain any documentary evidence to support counsel's assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, if the petitioner had wanted a master's degree or a bachelor's degree plus five years of experience to be required for the proffered position, it should have requested that DOL correct it when the Form ETA 750 was certified in 2007.

Accordingly, the underlying Form ETA 750 was certified on the terms that the requirements of the proffered position may be met with bachelor's degree in computer science, mechanical or electrical engineering or related field plus three years of experience in the job offered or in the related occupation of software development, and thus, the job offer portion of the Form ETA 750 does not require a master's degree or a bachelor's degree plus five years of progressive experience in the specialty as minimum requirements for the proffered position. Therefore, the petition cannot be approved for the requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability. In this matter, the appropriate remedy would be to file another petition for classification as a skilled worker pursuant to section 203(b)(3)(i) of the Act.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified additional grounds of ineligibility. The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petitioner filed the instant petition seeking to employ the beneficiary permanently in the United States as a software quality assurance manager. However, the Form ETA 750 states a different capacity (software quality engineer) than the one in which the petitioner intends to employ the beneficiary. The petitioner is not in compliance with the terms of the Form ETA 750 and has not established that the employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

The beneficiary must engage in the profession relevant to the Form ETA 750 and applicable to this Immigrant Petition for Alien Worker (I-140). As stated in *Matter of Semerjian*, 11 I&N Dec. 751, 754 (Reg. Comm. 1966):

> It does not appear to have been the wish of the Congress to award such a preference to an alien who, although fully qualified as member of the professions, had no intention of engaging in his profession or, at least, in a related field for which he was fitted by virtue of his professional education or experience.

Therefore, the petitioner failed to submit valid labor certification to support the instant petition seeking to employ the beneficiary in a position of software quality assurance manager and thus, the petition cannot be approved.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). The priority date in the instant case is July 24, 2003. Thus, the petitioner must establish that the job offer to the beneficiary was a realistic and *bona fide* one as of the priority date and has been continuing to the present.

The AAO notes that another company filed a From ETA 750 for the instant beneficiary on June 20, 2003, and an I-140 immigrant petition for the instant beneficiary based on the labor certification certified on June 12, 2006. The immigrant petition was approved on January 8, 2007. It is doubted that the job offer extended to the beneficiary by the instant petitioner was realistic as of its priority date since the beneficiary had already accepted another permanent job offer one month ago. It is also doubted that the beneficiary would fill the proffered position and further, that the job offer is still realistic and *bona fide* because the beneficiary has another immigrant petition approved while the instant petition is pending with the AAO on appeal. The AAO finds that the record does not contain sufficient evidence to establish that the beneficiary would fill the proffered position and further that the petitioner's job offer was and has been realistic and bona fide as of the priority date and to the present. Therefore, the petitioner failed to establish that its job offer to the beneficiary is a realistic one. Accordingly, the petitioner cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.